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IN THE

Supreme Court of the United States

PAUL E. JOHNSON,

Petitioner,

—v.—

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE

For NOW Legal Defense and Education Fund; National Organization for Women; American Civil Liberties Union; California Women Lawyers; Employment Law Center; Equal Rights Advocates; Federally Employed Women Legal and Education Fund; League of Women Voters of the United States; NAACP Legal Defense and Educational Fund; National Women's Law Center; Northwest Women's Law Center; Women Employed; Women's Equity Action League; Women's Law Project; Women's Legal Defense Fund

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Fullilove v. Klutznick, 448 U.S. 448 (1980)	38
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Kilgo v. Bowman Transportation Co., 570 F. Supp. 1509 (N.D.Ga. 1983), aff.d, 789 F.2d 859 (11th Cir. 1986)	60
Local 28 of the Sheet Metal Workers v. EEOC, 106 S. Ct. 3019 (1986)	5,18
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Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978)	6

Muller v. Oregon, 208 U.S. 412 (1908) 48

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 48

Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978).. 5,6,9

Teamsters v. United States, 431 U.S. 324 (1977) 14,15

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 3,5,8,10,13,14,15,16,20, 25,26,36,38,40,42,43

Wygant v. Jackson Board of Education, 106 S. Ct. 1842 (1986) 5,6,9,10,11,12,16,37,38,41

STATUTES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. 4,50

H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) 13

42 Fed. Reg. 41379 (1977) 60

43 Fed. Reg. 14892 (1978) 61

43 Fed. Reg. 20760 et seq. (1978).. 60

BOOKS, STUDIES, PAMPHLETS AND PERIODICALS

Babcock, Freeman, Norton, and Ross, eds., Sex Discrimination and the Law (1975) 46

Bureau of Labor Statistics, U.S. Department of Labor, Employment and Earnings (1985) 52

Bureau of Labor Statistics, U.S. Department of Labor, Employment and Earnings (1986) 53

Chafe, The American Woman: Her Changing Social, Economic and Political Role, 1920-1970 (1972) 48

Examination on Issues Affecting Women in Our Nation's Labor Force: Hearings Before the Senate Committee on Labor and Human Resources, 97th Cong., 1st Sess. (1981) 62

E. Flexner, Century of Struggle (rev. ed. 1975) 45,46

H. Hammerman, A Decade of New Opportunity-Affirmative Action in the 1970's (1984) 53,58

A. Hill, "Protection of Women Workers and the Courts: A Legal Case History," 5 Feminist Studies 247 (1979) 46

Journal of Women in Culture and Society No. 3 (Spring 1976) .. 56

J. Leonard, The Impact of Affirmative Action (1983) 57

G. Lerner, The Grimke Sisters of South Carolina (1967)..... 45

J. Malveaux, Low Wage Black Women: Occupational Descriptions, Strategies for Change (January 1984) (unpublished paper prepared for the NAACP Legal Defense and Educational Fund, Inc.) 49,51

G. Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (Twentieth Anniversary Edition 1964) 44

Office Of Federal Contract Compliance Programs, Employment Patterns of Minorities and Women in Federal Contractor and Non-Contractor Establishments, 1974-1980 (1984) 58

Office Of Federal Contract Complianc Programs, Women in Construction (1981) 61

Reskin and Hartman, eds., Women's Work, Men's Work - Sex Segregation on the Job, National Academy (1986) 50,56,62,63

M.R. Walsh, Doctors Wanted: No Women Need Apply (1977) 45

Westley, A Territorial Issue: A Study of Women in the Construction Trades (1982) 61

Women's Bureau, U.S. Department of Labor, Time of Change: 1983 Handbook on Women Workers (1983) 50,51

Women's Bureau, U.S. Department of Labor, 20 Facts on Women Workers (1984) 56

Women's Bureau, U.S. Department of Labor, The United Nations Decade for Women, 1976-1985: Employment in the United States (1985) 52

Women's Bureau, U.S. Department of Labor, "A Woman's Guide to Apprenticeship" (1980) 63

INTERESTS OF AMICI CURIAE*

The NOW Legal Defense and Education Fund, The Women's Legal Defense Fund and other amici are organizations dedicated to securing equal rights for women under the law.**

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as set forth by the Respondent in the instant case.

SUMMARY OF ARGUMENT

This case provides this Court with its first opportunity to address the lawfulness, under Title VII, of sex-based voluntary affirmative action. In light of the similar historic and pervasive discrimination suffered by both women and minorities in the workplace, and Title

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* Letters of the parties reflecting their consent to the filing of this brief are being filed in the Court.

** Descriptions of these organizations appear in the Appendix to this brief.

VII's equal treatment of sex and race discrimination, prior decisions of this Court upholding race-based affirmative action are controlling.

In this regard, this Court has repeatedly recognized that Title VII specifically allows employers to take voluntary affirmative, race-conscious steps to remedy discrimination against minorities -- and, by analogy, women. Decisions of the Court have also recognized that voluntary measures to comply with Title VII are preferred to litigation, and that employers may implement such affirmative action plans based solely on gross statistical disparities in the work force, without specific admissions of past discrimination.

In this case, the implementation of an affirmative action plan by the Santa Clara County Transportation Agency was justified

by the significant underrepresentation of women in various job categories, the gender-based hierarchy within the Agency, and numerous allegations of sex discrimination. The Santa Clara affirmative action plan thus fully complies with the requirements of Title VII as expounded by this Court in United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

Finally, numerous studies have demonstrated that, in the face of continuing sex discrimination, particularly against women seeking to enter non-traditional occupations, affirmative action is a uniquely effective remedy.

ARGUMENT

I. THE SANTA CLARA TRANSPORTATION AGENCY HAS MET THE PREDICATE FOR VOLUNTARY ADOPTION OF AN AFFIRMATIVE ACTION PLAN.

Petitioner's challenge is brought under Title VII of the Civil Rights Act of

1964, 42 U.S.C. § 2000e et seq.[1] Title VII

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[1] Both Petitioner and the United States as amicus curiae have argued that this case must be analyzed not only under Title VII, but, because Respondent is a public employer, under the Equal Protection Clause of the Fourteenth Amendment as well. See Petitioner's Brief, at 19-24; Brief for United States, at 6, 9-11. However, there is no Fourteenth Amendment claim properly before this Court. This litigation was filed and tried as a claim for relief under Title VII; no record has been developed with respect to the lawfulness of Respondent's plan under the Fourteenth Amendment. Johnson v. Transportation Agency, Santa Clara County, 770 F.2d 752, 754 n.1 (9th Cir. 1985) ("Johnson did not challenge the ... plan on equal protection grounds and we do not reach that issue."). If such a claim is to be made, it must be addressed to the district court in the first instance. See Local No. 93 v. City of Cleveland, 106 S.Ct. 3063, 3073 n.8 (1986) ("In the posture in which this case comes to us, we have no occasion to address the circumstances, if any, in which voluntary action by a public employer that is permissible under § 703 [of Title VII] would nonetheless be barred by the Fourteenth Amendment. Rather...we leave questions regarding the application of the Fourteenth Amendment ...to further proceedings before the district court.") Moreover, amici cannot help but note the irony in Petitioner's and the United States' claim. Petitioner and the government urge this Court to apply strict scrutiny to sex-based affirmative action

is a broad, remedial statute designed to provide relief from a long history of discrimination faced by blacks, other minorities, and women.

Beginning with its decision in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), this court has repeatedly recognized that race-conscious employment decisions made pursuant to an affirmative

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plans under the Fourteenth Amendment, rather than the intermediate standard of review adopted by this Court in all other cases of sex discrimination, see, Craig v. Boren, 420 U.S. 190, 197 (1976), and by some Justices of this Court in race-based affirmative action cases, see, e.g., Local 28, 106 S. Ct. 3019, 3052 (1986) (Brennan, J.); Wygant, 106 S. Ct. 1842, 1852-53 (1986) (O'Connor, J., concurring); Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 357-62 (1978) (Brennan, Blackmun, Marshall, White, JJ.). In urging the application of strict scrutiny, however, Petitioner and the government would afford more protection to the group least in need of it -- white males. In the absence of adopting a uniformly strict standard of review for sex-based claims under the Constitution, such an anomaly in the treatment of sex discrimination should not be sanctioned by this Court.

action plan can be lawful under Title VII. See also Local No. 93 v. City of Cleveland, 106 S. Ct. 3063, 3072-73, n.8 (1986). Cf. Univ. of Calif. Regents v. Bakke, 438 U.S. 265, 353 n. 28 (1978) (Brennan, Marshall, White, and Blackmun, J. J., concurring in part, dissenting in part); Wygant v. Jackson Board of Education, 106 S.Ct. 1842 (1986). In enacting Title VII, Congress extended the same protection from discrimination based on race to discrimination based on sex. Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 709 (1978). Thus, to the same extent that race-based affirmative action is deemed lawful under Title VII, sex-based affirmative action must similarly be upheld. As documented in Point III, infra, the historic and pervasive discrimination against women in the work force, so similar in both duration and nature to that

experienced by minorities, likewise justifies resort to such remedies.

A. An Employer May Voluntarily Adopt A Gender-Conscious Affirmative Action Plan On The Basis Of Gross Statistical Disparities In Its Work Force And Without Admitting Past Discrimination.

1. Voluntary Compliance With Title VII Is Preferred.

A majority of this Court has recognized that voluntary measures undertaken by employers to meet their obligations under Title VII are preferable to extensive and costly litigation. In Local 93, supra, Justice Brennan wrote for a majority of the Court:

> We have on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII. This view is shared by the Equal Employment Opportunity Commission (EEOC), which has promulgated guidelines setting forth its understanding that "Congress strongly encouraged employers...to act on a voluntary basis to modify employment practices

> and systems which constituted barriers to equal employment opportunity."

106 S. Ct. at 3072 (citations omitted).

This view echoed the Court's earlier statement in Weber, supra, in which the Court wrote:

> "It would be ironic indeed if a law triggered by a nation's concern over centuries of racial injustice ... constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."

443 U.S. at 204 (citation omitted).

In passing Title VII, Congress recognized that the long history of discrimination against minorities in America could not be reversed by the passage of the civil rights statute alone. Congress realized that only by a joint attack on invidious discrimination--voluntary actions taken by conscientious, responsible employers combined with

vigorous enforcement of Title VII--could society reach the point where each person is judged strictly on the basis of her or his own capabilities, without regard to race, sex, or religion. The value of voluntary actions by employers in remedying historical discrimination cannot be overestimated.[2]

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[2] See also Wygant, supra, wherein Justice O'Connor, concurring, recognized the "Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law.'" 106 S. Ct. at 1855, citing Regents of the University of California v. Bakke, 438 U.S. 265 (1978). Justice O'Connor continued: "The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance." 106 S. Ct. at 1855.

2. An Employer Is Not Required To Admit Past Discrimination Before Implementing An Affirmative Action Plan.

This Court has ruled that Title VII does not require employers formally to admit to past discrimination in order to implement a lawful affirmative action plan. In Weber, supra, this Court upheld, under Title VII, an affirmative action plan agreed upon by an employer and a union, despite a District Court finding that the employer had not been guilty of any past discriminatory hiring or promotion -- a finding which was affirmed by the Court of Appeals and left undisturbed by the Supreme Court. 443 U.S. at 225, n.6 (Rehnquist, J., dissenting).

Sound public policy dictates this principle. As Justice O'Connor explained in her concurring opinion in Wygant:

> The imposition of a requirement that public employers make

> findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations....
>
> ...As is illustrated by this case, public employers are trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken. Where these employers, who are presumably fully aware both of their duty under federal law to respect the rights of all their employees and of their potential liability for failing to do so, act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary, a contemporaneous findings requirement should not be necessary.

Wygant, 106 S. Ct. at 1855-1856.

Equally compelling reasons for rejecting a "contemporaneous findings" requirement were offered by Justice Marshall in his dissent:

> An explicit Board [of Education] admission or judicial determination of culpability...would only have exposed the Board in this case to further litigation and liability ...
>
> ...Petitioners would now have us inform the Board...that it should have delayed further [in integrating the school system], disputing its obligations and forcing the aggrieved parties to seek judicial relief. This result would be wholly inconsistent with the national policies against overloading judicial dockets, maintaining groundless defenses, and impeding good-faith settlement of legal disputes.... The Court is correct to recognize, as it does today, that formal findings of past discrimination are not a necessary predicate to the adoption of affirmative-action policies ...

Wygant, 106 S. Ct. at 1862-1863.

Thus, this Court has consistently recognized that requiring employers to admit to past discrimination prior to engaging in voluntary affirmative action would frustrate the purposes of Title VII and the enforcement of civil rights

generally. Only by continuing to reject a "contemporaneous findings" requirement will the Court help "create an atmosphere conducive to voluntary or local resolution of other forms of discrimination [those not eliminated by Title VII itself]". Weber, 443 U.S. at 204, citing H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) at 18.[3]

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[3] Though Santa Clara County and its Transportation Agency were not required to admit to past discriminatory practices in order to implement the affirmative action plan, there are indications in the record that both the County and the Agency were aware of the connection between their employment policies and the underrepresentation of minorities, women, and handicapped persons in the Santa Clara work force.

In its 1978 "Equal Employment Opportunity Affirmative Action Plan" ["1978 Agency Plan"], the Agency acknowledged that "affirmative, aggressive, continuing" actions were required "to remedy the effects of past practices." Excerpts from Clerk's Record ["Record"] at 38. Under a section entitled "Corrective Action," the 1978 Agency Plan continues, "Remedying the effects of past employment practices which may have excluded the appointment and promotion of ethnic/racial minorities and women at various levels of the work force

3. Statistics That Demonstrate A Marked Gender Disparity In A Work Force Provide A Sufficient Basis For The Adoption Of An Affirmative Action Plan.

The Court has recognized that statistics alone can be used to prove employment discrimination, or at the very least to establish a plaintiff's prima facie case. In Teamsters v. United States, 431 U.S. 324 (1977), Justice Stewart, writing for the Court, explained:

> Statistics are...competent in proving employment discrimination....Evidence of a longlasting

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is one of the objectives of the Affirmative Action Plan." Record at 83.

Similarly, the 1979 "Affirmative Action Plan, County of Santa Clara" ["1979 County Plan"] states that "continuing affirmative action must be taken to remedy the effects of past practices". Record at 60.

In this regard, the Agency's position is similar to that of the employer, Kaiser Aluminum, in Weber, supra, where "Kaiser denie[d] prior discrimination, but concede[d] that its past hiring practices may be subject to question." Weber, 443 U.S. at 210 (Blackmun, J., concurring).

> and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) [of Title VII] makes clear that Title VII imposes no requirement that a work force mirror the general population.

431 U.S. at 339 n.20.

Since Teamsters, a majority of the Court has agreed that significant statistical disparities may also justify the implementation of an affirmative action plan. In Weber, supra, the Court relied on statistical data which indicated that only 1.83% of the skilled craft workers in one of Kaiser's plants was black, while the local work force was approximately 39% black. In a concurring opinion, Justice Blackmun wrote, "[T]he Court...measures an individual employer's capacity for affirmative action solely in terms of a statistical disparity. The individual employer need not have engaged in discriminatory

practices in the past." Weber, 443 U.S. at 213. Cf. Wygant, supra, in which Justice O'Connor further explained the role of statistics in implementing an affirmative action plan:

> Public employers are not without reliable benchmarks in making [the determination to implement an affirmative action plan]. For example, demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination.

Wygant, 106 S. Ct. at 1856.

The Court has thus recognized that an employer may voluntarily adopt an affirmative action plan, based solely upon a significant statistical disparity between

the percentage of blacks or other protected groups in its work force and their representation in the relevant labor pool.

B. The Substantial Statistical Disparity And Allegations Of Sex Discrimination Justified Santa Clara County's Implementation of a Voluntary Affirmative Action Plan.

In developing its affirmative action plan, the Agency properly recognized the need for voluntary measures to remedy past discrimination. On the first page of its memorandum explaining its 1978 Plan, the Agency set forth its reasons for implementing the plan:

> The County and Transit District Boards of Supervisors recognize that mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons. Affirmative, aggressive, continuing actions are required to attain this goal.

Record at 38. As a number of cases decided by this Court have demonstrated, even repeated legal prohibitions of discrimination may be insufficient to prevent discriminatory practices. See, e.g., Local 28, Sheet Metal Workers v. E.E.O.C, 106 S. Ct. at 3019.

In the face of the persistent underrepresentation of women in five of the seven major E.E.O.C. categories at the Agency, Record at 51, and numerous allegations of discrimination on the basis of gender, see infra at pp. 20-24, the voluntary measures taken by the County are the precise actions a public employer should take. Rather than allowing the gross underrepresentation to continue and risking lawsuits due to the County's "very weak posture in terms of Title VII" (Reporter's Transcript of Proceedings ["Transcript"] at

12), the County chose to implement a narrowly tailored affirmative action plan.

In this case, the statistical under-representation of women in the Santa Clara work force was drastic. Statistics in the 1978 Agency Plan demonstrated that of the 124 Agency employees who were in the E.E.O.C. category of "Technicians," only 9.7 percent were women. Women comprised only 8.6 of the "Professionals", and only 7.1 percent of the "Officials and Administrators". Of the 238 "Skilled Craft Workers"--the position for which Diane Joyce successfully applied--all were male at the time of the implementation of the affirmative action plan. "Service and Maintenance Workers," the category best integrated, still included only 22 percent women. Record at 49.

The statistics clearly demonstrated not only that "women are the most under-

represented group in the Agency" (Record at 51), but also that one hundred percent of the skilled craft workers were men--a disparity even greater than the racial disparity among the skilled craft workers in the Weber case. See supra, p. 15.

In addition to the statistical disparity noted above, other evidence of sex discrimination within the Agency is evident from the record.

Diane Joyce, who received the promotion to the road dispatcher position which Petitioner Johnson claimed was rightfully his, alleged that she repeatedly encountered discrimination on the basis of sex:

> A. ...Many times I felt I was discriminated against because of my sex, but I don't think I ever filed or complained or any formal grievances because of it, simply because it would be very difficult to prove.

Transcript at 118.

Joyce alleged, for example, that stereotypical attitudes and prejudices prompted male supervisors to seek a man to fill an account clerk position in 1972. Transcript at 110-11. Although she eventually obtained the job, Joyce alleged that she faced many major instances of what she perceived as discrimination. Transcript at 119. Additionally, as the first woman to be a road maintenance worker, Transcript at 111, Joyce found it "difficult" due to the attitudes of the male road maintenance workers, who were uncomfortable working with a woman. Transcript at 112. She felt "singled out", Transcript at 90, because she was denied opportunities to "work out of class," Transcript at 115-16, and actually had to file a grievance before she was able to receive coveralls routinely issued to men. Transcript at 89-90.

Joyce continued to experience discrimination when she applied for a promotion to become a road dispatcher. One of the three male supervisors involved in the selection process for the position referred to Joyce as a "rebel-rousing [sic], skirt-wearing person," Transcript at 153, and also said that Joyce was "not a lady" because of her use of "rough language". Transcript at 161. Another of the three interviewers scheduled Joyce's oral interview during a time he knew she was unavailable. Transcript at 95-96. As a result of these and other experiences which she perceived as sex discrimination on the basis of sex during her employment with the Agency, Transcript at 118-19, Joyce contacted the affirmative action coordinator of the department, in an attempt to get "fair consideration for the job." Transcript at 95.

In addition to Joyce's experiences, other examples of discrimination appear in the record. James Graebner, the director of the Agency, stated that he was aware of a number of charges of sex discrimination since 1978 that had been brought to the attention of the affirmative action officer, including allegations of discrimination among the skilled craft workers (the category to which Joyce and Petitioner Johnson belonged). Transcript at 43.

Myra Beals, who at the time of Joyce's promotion was the assistant personnel officer at the Agency, also testified regarding discriminatory practices encountered by women in the agency. The occurrences included, inter alia, a woman who was denied training, essential for a promotion, given to men in her position, Transcript at 231, 252-53; a pregnant woman denied employment as a utility worker, even

though her pregnancy did not affect her ability to do the job, Transcript at 256; and harassment and threats that Joyce faced as a road maintenance worker, Transcript at 254-55.

Thus, it is clear that the County and Agency plans were premised not only on statistical disparities which indicated a severe underrepresentation of women in the Santa Clara work force, but were justified as well by numerous allegations of specific instances of discrimination on the basis of sex. Given this factual background, Santa Clara's adoption of the plan was clearly lawful under prior decisions of this Court.

II. THE SPECIFIC ELEMENTS OF THE SANTA CLARA AFFIRMATIVE ACTION PLAN FULLY COMPLY WITH TITLE VII UNDER THE STANDARDS ESTABLISHED IN UNITED STEELWORKERS OF AMERICA v. WEBER.

The affirmative action plan adopted by Santa Clara County meets the legal stan-

dards first articulated by this Court in Weber, supra. In that decision, the Court, without "detail[ing] the line of demarcation between permissible and impermissible affirmative action plans," identified four elements which placed the Kaiser Aluminum plan "on the permissible side of the line". 443 U.S. at 208. [4]

The Weber decision, interpreted in the context of a gender-conscious affirmative action plan, requires that the plan (1) be designed to open employment opportunities to women and break down old patterns of gender segregation and hierarchy; (2) not unnecessarily trammel the interests of male

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[4] Given this Court's description in Weber of the criteria characterizing a lawful voluntary affirmative action plan under Title VII, the government's assertion that no "majority opinion of this Court ever set forth with precision any simple test or sweeping rule for determining under what circumstances class-based remedies are permissible" is misleading. Brief for Unites States at 12.

employees; (3) not create an absolute bar to the advancement of male employees; and (4) be a temporary measure. 443 U.S. at 208. While the Weber opinion does not state that all four of these elements must be present for an affirmative action plan to be valid under Title VII, it does state that any plan which meets these four elements will be valid under Title VII.

As discussed infra, pp. 26-42, the affirmative action plan adopted by the Agency fully meets each element of the Weber test.

A. The Plan Was Designed To Open Up Employment Opportunities To Women And Break Down Old Patterns of Segregation And Hierarchy.

The Agency affirmative action plan was intentionally designed to expand the employment opportunities available to women. The 1978 Agency Plan states that

the affirmative action plan was required to assure that:

> b. Any possible barriers to employment promotion of...women...are removed.
>
> c. Aggressive and imaginative continuing efforts are made to attract and assist...women...to qualify for employment and promotion as needed to attain an equitable representation in all occupational fields and at all job levels.

Record at 38.

As discussed supra, pp. 19-20, the 1978 Agency Plan detailed the significant underrepresentation of women in five of the seven major E.E.O.C. categories in the Transportation Agency. The plan also provided ample evidence of a gender-based hierarchy in the Santa Clara Department of Transportation: the percentage of women in each E.E.O.C. category generally decreased with movement up the work force hierarchy to positions involving greater responsibility. Thus, while 90 percent of the

paraprofessionals and 75.9 percent of the office and clerical workers were women, only 8.6 percent of the professionals and 7.1 percent of the officials and administrators were women. Record at 49.

To increase the employment opportunities for women, the 1978 Agency Plan established an employment goal of 36.4 percent women within each job category in the Agency, to match the percentage of women in the County work force. Record at 52. Since the Plan recognized that it would be "extremely difficult" to increase the representation of women in certain job classifications, the Plan "mandates that the Agency's Affirmative Action employment goals be attained in successive stages": first for the Agency as a whole, then by E.E.O.C. job category, then by the major job classifications used by the Agency. Record at 54. The 1978 Agency Plan

specifically states that yearly hiring goals should be established for three purposes:

1. Provide a guide to the Agency Personnel Office and Division Directors indicating specific job classifications where underrepresentation of women...exists and where Affirmative Action is required.

2. Provide an objective standard for use in determining if the representation of...women...in particular job classifications is at a reasonable level in comparison with estimates of the numbers of these groups in the area work force....

3. Permit adjustment of Agency hiring goals as may be necessary because of limitations on hiring or reductions in the County work force....

Record at 55-56.

The 1978 Agency Plan also established that "one of the primary actions to increase employment opportunities for women is to establish positions and related training programs that will permit women

with minimal experience to enter and progress to job classifications where they are underrepresented". Record at 53. The Plan recognized that the slow expansion of the Transportation Agency would make it difficult to meet the Plan's employment goals. Therefore, the Plan urged that to whatever extent promotions were made, every attempt should be made to benefit women, minorities, and the handicapped. The Plan recommended the following steps:

> 1. All appointments to be made in categories in which underrepresentation exists will receive special attention....
>
> 2. ...When an appointment is made that does not include a member of the protected-classes, the Affirmative Action Coordinator will be informed before the appointment is made.

Record at 86. The Plan also required that supervisory personnel become familiar with the Plan, explain the Plan to their subordinates, and "give all possible

support to attainment of its objectives." Record at 46.

Another key goal of the 1978 Agency Plan was to ensure that women "get the maximum opportunity for placement and career progression" in the 734 newly authorized positions created by the expansion of the County Transit System. Record at 54-55.

Graebner, the director of the Agency, testified regarding other affirmative actions taken in accordance with the plan, including specific plans to recruit women and minorities to be bus drivers, Transcript at 51; advertising and public presentations to recruit women to be engineers, Transcript at 52; and speeches, presentations, and "word-of-mouth type of advertising" to recruit women and minorities for positions in the skilled crafts area, Transcript at 52-53.

All of the above measures were designed to increase the employment opportunities for women and minorities in the Agency and to make job categories which were at the time severely segregated by gender more representative of the Santa Clara County labor force.

B. The Plan Does Not Unnecessarily Trammel The Interests Of Male Employees, Nor Does It Create An Absolute Bar To Their Advancement.

The Agency affirmative action plan does not unnecessarily trammel the legitimate interests of male employees, and does not act as an absolute bar to their promotion. The Plan creates no absolute preferences for women in any job category. While supervisors are encouraged to hire and promote women in positions in areas where women have been underrepresented, there are no requirements that a woman be hired to fill any particular job. The plan reflects

the Agency's awareness that its prior promotional practices had done nothing to alleviate the gross underrepresentation of women; rather than continue prior practice, the Agency correctly chose to implement promotional goals. In this sense, the Plan's goals are to be differentiated from quotas, which would require the hiring of a specified percentage of women. See Record at 67 ("The 'goals' established for each County Department/Agency should not be construed as 'quotas' that must be met. The 'goals' should rather be seen as realistic desired levels of achievement correcting imbalances in a Department/ Agency work force.").

The goals were also designed to be flexible and responsive to changes in the county work force. The 1979 County Plan states, "Goals should take into account such factors as turnover, layoffs, lateral

transfers, new job openings, retirements and availability of minorities, women and disabled persons in the area work force who possess the desired qualifications or potential for placement." Record at 67.

Similarly, the goals established in the 1982 Santa Clara County Transportation Agency Plan ["1982 Agency Plan"] recognized the difficulty of identifying qualified women for particular job categories, and also the impact that a countywide hiring freeze would have on the affirmative action goals. For example, though the overall plan set a goal of 36.4% women in each job category, Record at 52, the 1982 plan established a goal that only 3 of the projected 55 people to be hired as skilled craft workers be women, corresponding to less than 6% of the new hires. Record at 85.

The 1978 Agency plan also included a regular annual review to reevaluate the numerical goals of the plan and make any necessary adjustments. Record at 55-56.

These and other elements of the 1978 Agency plan demonstrate that it was tailored to insure that its goals were realistic and did not require layoffs of male employees or the hiring or promotion of unqualified workers.

Additionally, while the affirmative action plan was designed to remedy gradually the longstanding underrepresentation of women in the Agency, it did not interfere with the Agency's commitment to hiring and promoting only qualified candidates. Joyce was clearly qualified to fill the road dispatcher position, as recognized in the testimony of James Baldanzi, Transcript at 154, and Graebner, Transcript at 24-25, and as evidenced by her successful perfor-

mance of the job since her promotion, Transcript at 72-73.[5]

Nor did the plan obstruct the normal operation of the Agency's merit selection plan. Under the Agency's "rule of seven", the merit selection process guaranteed only that an applicant chosen to fill a position would be one of the top seven individuals who passed the promotional examination. Transcript at 18-19. The appointing authority retained the discretion, consis-

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[5] Whether or not Johnson was more qualified than Joyce to fill the road dispatcher position is not relevant to the legitimacy of the County plan since both were fully qualified under the County's merit selection plan. See text, infra. An affirmative action plan can legally provide a preference to those persons who are members of groups which have been subject to a long history of discrimination, as long as the persons who are ultimately hired or promoted are in fact qualified. Cf. Weber, supra, where the Court upheld an affirmative action plan where "[t]he most senior black selected into the program had less seniority than several white production workers whose bids for admission were rejected." 443 U.S. at 199.

tent with the merit selection process, to hire or promote any one of the top seven candidates. Transcript at 19.

Finally, the Wygant majority opinion also suggests that an affirmative action plan involving promotional goals is significantly less likely to run afoul of Title VII than a plan requiring layoffs. In their operation, promotional goals more closely resemble hiring goals than layoffs, in that they involve only the denial of a future employment opportunity, which "is not as intrusive as loss of an existing job." Wygant, 106 S. Ct. at 1851. Similarly, an employee's expectations of a continued income and job security are not affected by promotional goals, as they would be by layoffs. In addition, unlike both hiring goals and layoffs, promotional goals at least insure that the employee whose interests may be affected retains a

job with the employer in question, as well as an opportunity to compete again for a promotion at a later date. [6]

C. The Agency Affirmative Action Plan Is Temporary.

The affirmative action plan at issue in this case also meets the fourth Weber criterion in that it is temporary and will end when a representative work force is attained.

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[6] Indeed, Petitioner was eventually promoted to the position of road dispatcher, after an additional road dispatcher position was created. Respondent's Brief in Opposition to Certiorari at 6 n.4. In any event, this Court has repeatedly recognized that "innocent" persons may be required to share in the burden of remedying employment discrimination. See Fullilove v. Klutznick, 448 U.S. 448, 484 (1980) ("It is not a Constitutional defect in this program that it may disappoint the expectations of non-minority firms. When effecting a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible."). See also Wygant, 106 S.Ct. at 1850 (Powell, J., joined by Burger, C.J., and Rehnquist, J.).

The Court of Appeals for the Ninth Circuit correctly found the 1978 Agency Plan to be temporary:

> The Agency plan clearly aims at attainment. The district court correctly found that the plan contains no date certain or other express statement of fixed duration. The plan, however, also contains no statement that it is intended to be permanent.... Moreover, the entire focus of the plan is on "attaining," rather than maintaining, balance.... Unlike the district court, we believe that this emphasis upon the "attainment" of a representative work force does "have the effect of ending preferential treatment to women" once parity is achieved.

Johnson, 770 F.2d at 756. The Court of Appeals also recognized that, since affirmative action plans are usually voluntarily adopted by employers who wish to "express and act upon their commitment to social justice," such plans should not be interpreted "so as to make their validity depend on technicalities in

drafting," since to do so "would only discourage their adoption and encourage litigation." 770 F.2d at 757.

The Court of Appeals also noted an important distinction between the affirmative action plan upheld by the Supreme Court in Weber and the Agency plan. The Weber plan required that a fixed percentage of openings be filled by minorities, necessitating that the plan have a reasonably explicit deadline. However, the Agency plan establishes no fixed percentages, but "allows flexibility in working towards the long-range goals, with special emphasis on recruitment, selection, training, and promotion of minorities, women, and the handicapped," making it less necessary for the plan to have an explicit ending date. Johnson, 770 F.2d at 757. By employing flexible goals that could be responsive to changes in the workforce

while continuing to work towards the ultimate achievement of the County's employment goals, the plan was clearly "not intended to maintain male-female balance, but simply to eliminate a manifest male-female imbalance." Id. (emphasis added). Just as a public employer can responsibly and legally use evidence of a racial disparity in its work force as a "reliable benchmark" for implementing an affirmative action plan, see Wygant, 106 S. Ct. at 1856 (O'Connor, J., concurring), a public employer can use statistical evidence of the underrepresentation of women in its work force as an "objective standard" for determining when affirmative action is no longer necessary.

As the Court of Appeals recognized, once the Agency has attained gender balance in its job categories, preferential treatment for women would end. Although,

as Agency Director James Graebner testified, the "desire to hire, to promote, to give opportunity and [illegible]ng on an equitable, non-discriminatory basis" will continue as a "permanent part" of the Agency's operations, Transcript at 49, the affirmative action plan will exist only as long as statistics continue to reveal a significant gender disparity and the continuing underrepresentation of women in the Santa Clara County work force.[7]

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[7] Both the District Court and the Petitioner relied on other testimony of Graebner to argue that the affirmative action plan was in fact permanent. However, as the Court of Appeals recognized, Graebner's testimony, when read in context, "is no more than an expression of the Agency's long-range commitment to affirmative action, and certainly not the expression of an Agency policy to continue the program beyond the point that the law allows." Johnson, 770 F.2d at 757.

See also Weber, where the Court was presented with similar testimony from an industrial relations superintendent at Kaiser, and nevertheless found the Weber plan to be temporary. ("Once the goal is reached of 39 percent...we will then revert

III. CAREFULLY TAILORED, GENDER-CONSCIOUS MEASURES ARE REQUIRED TO REMEDY THE HISTORIC AND PERVASIVE EMPLOYMENT DISCRIMINATION WOMEN HAVE EXPERIENCED.

Like minority males, women have suffered from pervasive and continuing discrimination. Like race discriminatio , sex discrimination has operated to exclude women from equal employment opportunity. And like the effects of race discrimination, the effects of sex discrimination must be remedied by aggressive enforcement of fair employment laws, coupled with affirmative measures that take into account the historic discrimination suffered by women.

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to a ratio of what the percentage is, if it remains at 39 percent and we attain 39 percent someday, we will then continue placing trainees in the program at that percentage.") 443 U.S. at 223 n.3 (Rehnquist, J., dissenting).

A. Women Have Suffered Histori Discrimination In Employment.

Sex-based employment discriminatio had its genesis in a culture that tradi tionally limited women to the domesti sphere and a legal system that supporte such constraints by viewing women as littl more than appendages to their spouses. The theory underlying restrictions upo women was based on the belief that women' natural role in life was that of wife an

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[8] The legal system that supported th treatment of women is akin to the syste that supported slavery:

> In the earlier common law, women an children were placed under th jurisdiction of the paternal power When a legal status had to be foun for the imported Negro servants in th seventeenth century, the nearest an most natural analogy was the status o women and children. The nint commandment -- linking together women servants, mules, and other property- could be invoked, as well as a grea number of other passages of Hol Scripture.

G. Myrdal, An American Dilemma: The Negr Problem and Modern Democracy 1073 (Twen tieth Anniversary Edition 1964).

mother, and that they should not venture outside their sphere. Thus, when women began to work outside the home, the occupations in which they found employment were those in keeping with their domestic roles: bakers in factories, jobs in laundries, canneries, and the textile and clothing industries.[9]

Law and custom prevented women from pursuing other occupations. Women were barred from the practice of medicine[10] and law[11]; indeed, they had to fight even to speak on a public stage.[12] Women came to

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[9] E. Flexner, Century of Struggle, Chap. II (rev. ed. 1975).

[10] Flexner, supra; M. R. Walsh, Doctors Wanted: No Women Need Apply (1977).

[11] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); Ex Parte Lockwood, 156 U.S. 116 (1893).

[12] G. Lerner, The Grimke Sisters of South Carolina (1967).

be accepted as teachers only when low budget allocations for public school systems forced school officials to hire women at lower wages that schools could afford and that women were forced to accept.[13]

As women entered the workplace in increasing numbers in the nineteenth and early twentieth centuries, their employment opportunities were additionally restricted by "protective" legislation.[14] Although such legislation was devised in part because of a desire to benefit workers, it served to buttress further the discriminatory notion that women were a special class of worker who could be excluded from

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[13] Flexner, supra.

[14] See A. Hill, "Protection of Women Workers and the Courts: A Legal Case History," 5 Feminist Studies 247 (1979). See also Babcock, Freeman, Norton, and Ross, eds., Sex Discrimination and the Law 28 (1975).

employment opportunities because of domestic and maternal responsibilities, and effectively excluded women from many higher-paying jobs.[15]

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[15] These laws were usually upheld based on the differences between the sexes:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race...Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior strength, and this control in various forms, with diminishing intensity, has continued to the present... Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not

During World War II women were encouraged to enter the workforce, particularly in war industries. Women's share of the labor force increased from 29% in 1941 to 37% in 1944. Many women entered jobs that were nontraditional for females. At the war's end, however, women lost their jobs to men returning to the civilian labor force.[16] A further consequence of World War II was the enactment of veterans' preference laws, which severely limited federal and state employment opportunities for women.[17]

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necessary for men and could not be sustained.

Muller v. Oregon, 208 U.S. 412, 420-422 (1908).

[16] Chafe, The American Woman: Her Changing Social, Economic and Political Role, 1920-1970, pp. 135-150 (1972).

[17] See Personnel Administrator of Massachusetts v. Feeney, 422 U.S. 256 (1979).

Women of color, who suffer from discrimination based on sex and race or national origin, have borne a double burden of exclusion from true equal employment opportunity. Although historically black women have participated in the labor force in larger numbers than white women, they fail to reap the benefits of their greater participation: black women historically worked only as domestic and personal servants.[18] Thus their participation in the workforce was limited by the stereotypes associated with their gender and their race.

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[18] Indeed, for a time, black women's concentration in domestic and personal service occupations increased as their participation in the paid labor force grew. J. Malveaux, Low Wage Black Women: Occupational Descriptions, Strategies Change, 4 (1984) (unpublished paper prepared for the NAACP Legal Defense and Educational Fund, Inc.) [hereafter cited as Low Wage Black Women].

B. Employment Discrimination Against Women Persists.

The passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., has eliminated most de jure employment discrimination against women, and the increased entry of women into the labor force has been unprecedented. In 1984, women constituted 43% of the labor force.[19]

Yet, even though women currently work outside the home in ever-growing numbers, they remain clustered in occupations that are predominantly female. Women are primarily clerical workers, service workers, health workers and elementary and secondary school teachers. Women's Bureau U.S. Department of Labor, Time of Change:

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[19] Black women were most likely to be in the labor force (55.5%), followed by white women (53.4%), and Hispanic women (49.8%). Reskin and Hartman, eds. Women's Work, Men's Work - Sex Segregation on the Job, National Academy (1986) [hereafter cited as Women's Work].

1983 Handbook on Women Workers [hereafter cited as Time of Change].

Black and Hispanic women similarly continue to be clustered in female-dominated occupations. Black women generally hold the lowest-paying among the traditionally female jobs: domestic and personal service work, child care workers, nurse's aides, and food counter workers.[20] Hispanic women, while also employed as clericals, are employed to a greater extent as operatives: dress makers, assemblers, and machine workers. Time of Change, supra.

Women's earnings also reflect continuing discrimination. In 1985, a woman aged 25 or over with four or more years of college who was working full-time, year-round, earned 64% of the salary of a

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[20] Low Wage Black Women, supra n. 18 pp. 8, 12-13.

similarly situated man. Women's Bureau, U.S. Department of Labor, The United Nations Decade for Women, 1976-1985: Employment in the United States, July 1985. Women of color are even less well off. Black women earn about 59 cents for every dollar earned by a man; Hispanic women, 55 cents. Bureau of Labor Statistics, U. S. Department of Labor, Employment and Earnings, (January 1985).

C. The Underrepresentation Of Women In Nontraditional Jobs In The Transportation Department Of Santa Clara County Is An Example Of A Pervasive Phenomenon.

The underrepresentation of women in jobs that are not traditional for female workers is striking evidence that women continue to be excluded from the full range of employment opportunities.

The presence of women in nontraditional occupations is generally minimal. Women comprised only 2.4% of skilled crafts

workers in 1984.[21] According to 1985 annual averages, women comprised 2% of workers in the construction trades generally; they were .5% of brickmasons and stonemasons, 1.2% of carpenters, and 3.1% of construction laborers.[22]

The exclusion of women from nontraditional occupations in the Santa Clara County Transportation Department is not unusual. The Southeast Women's Employment Coalition (SWEC) performed an analysis, based on figures received from the Federal Highway Administration of the U.S. Depart-

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[21] H. Hammerman, A Decade of New Opportunity-Affirmative Action in the 1970's, Table 3, "Occupational Distribution of Employed Women", p. 125 (1984) [hereafter cited as Affirmative Action in the 1970's].

[22] Bureau of Labor Statistics, U.S. Department of Labor, Employment and Earnings, (January 1986). These figures, of course, are a direct reflection of discrimination women have traditionally experienced in these occupations, and should not be viewed as an indication of lack of interest. See n. 27, infra.

ment of Transportation, of female participation in the work forces of 39 state departments of transportation. SWEC found that nation-wide, fewer than 4% of highway jobs are held by women, and one-fourth of 1% are held by women of color. The preliminary findings, released in December, 1985, focused on the promotion and hiring of women and minorities in six states. In California, only 17% of DOT employees were female and more than half worked in office or clerical positions; in Georgia, females constituted fewer than 10% of DOT employees, and no women served in official, administrative, or skilled craft positions; and in New York, women were less than 12.3% of the DOT workforce, and black women were only one-half of one percent.[23]

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[23] SWEC and a number of other organizations obtained the information as a result of complaints filed with the Department of Transportation and the Office

D. Employment Discrimination Means Poverty For Women And Their Families.

The discrimination suffered by women in the workplace, resulting in the inability to get jobs that pay well, has a devastating impact on the standard of living enjoyed by them and their families. The majority of women who work outside the home substantially or fully support themselves and their families. In 1981, about one in five women workers maintained families on their own. Women of color make even larger economic contributions to their families than do white women.[24]

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of Federal Contract Compliance Programs of the Department of Labor. The other three states examined in the preliminary findings were Maryland, Missouri, and Ohio. SWEC found that the six states' performance was not unusual; virtually all of the states studied had extremely poor hiring and promotion records for women and minorities.

[24] Women's Work, supra. Indeed, female headed households have always existed in substantial numbers. In any

In 1983 women represented 61% of all persons aged 16 and over who had incomes below the poverty level. In 1983, the proportion of poor families maintained by women alone was 47%. Nearly 72% of black families with income below the poverty level were headed by women alone. Forty-six percent of Hispanic families and 37% of white families were similarly situated. Women's Bureau, U.S. Department of Labor, 20 Facts on Women Workers (1984).

E. Affirmative Action Is An Effective And Necessary Tool In Ensuring That Women Achieve Equal Employment Opportunity.

Recent studies confirm that affirmative action, in the form of goals and

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period of history for which there are data, between one-fifth and one-half of all households were headed by women alone. See Journal of Women in Culture and Society No. 3, Part 2 at 95, 102, 103 (Spring 1976).

timetables, is an effective tool for women and minorities to achieve equal employment opportunity. For example, a 1983 study of the federal enforcement of Executive Order 11246, as amended, comparing contractor and noncontractor establishments, found that affirmative action has been successful in promoting the employment of minorities and females.[25] In 1984, the Office of Federal Contract Compliance Programs (OFCCP) released a study which reached the same conclusion.[26]

Moreover, only through the use of gender- and race-conscious measures can

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[25] J. Leonard, The Impact of Affirmative Action (1983). Leonard found that the "affirmative action goal is the single best predictor of subsequent employment demographics." Id., p. 25.

[26] Office of Federal Contract Compliance Programs, Employment Patterns of Minorities and Women in Federal Contractor and Non-Contractor Establishments, 1974-1980 (1984). See also Affirmative Action in the 1970's, supra.

women gain access to jobs from which they have been excluded in the past. Such measures serve not only as a spur to employers to recruit, hire, and promote qualified women, but as evidence to interested women that nontraditional jobs are an option for them.

Thus, for example, in 1977, as part of its mandate under Executive Order 11246, the Office of Federal Contract Compliance Programs (OFCCP) conducted a review of the status of women in the construction industry and concluded that numerical goals and timetables for women in construction were necessary to counteract the years of sex discrimination in the construction trades. The OFCCP surveyed 1970 Census data, held a series of hearings, and collected data on the experiences of a variety of public and private employers. The Census data revealed that women

constituted only 5% of the labor force in craft and kindred occupations, and only 1.2% of the construction labor force. Witnesses at the hearings testified that it was discrimination and not the lack of available and interested female applicants that was keeping the percentage of women in the construction trades at such a low level. The data collected were replete with examples of women applying for jobs once they become available.[27] OFCCP

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[27] 42 Fed. Reg. 41379 (1977). This corresponds with the experience of amici who, individually and collectively, have represented many women seeking nontraditional employment. See e.g., Kilgo v. Bowman Transportation Co., 570 F. Supp. 1509 (N.D. Ga. 1983), aff'd., 789 F.2d 859 (11th Cir. 1986) (over-the-road truck-driving); Christman v. American Cyanimid Co., 92 F.R.D. 441 (N.D. W.Va. 1981) (granting class action status) (chemical industry). In these and other situations, women refrained from seeking employment in industries or jobs which were "male only" by tradition or design, a fact reflected in both labor pool and applicant flow data. However, once women began to be hired,

concluded that "unless specific affirmative action steps are prescribed, construction employment opportunities will not reach the female workforce of this country."[28]

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usually under the threat of litigation or government review, applications from women increased dramatically, reflecting the existence of a pool of women workers previously discouraged by the employers' reputation for discrimination. This was also the conclusion of the Department of Labor in regulating affirmative action provisions for women in apprenticeship and training programs. See 43 Fed. Reg. 20760 et seq. (1978) ("Thus, the Department's experience indicates that there are women available and interested in entering the skilled trades. However, the longstanding reputation of the trades for excluding women discourages many women from applying for these jobs." 43 Fed. Reg. at 20763).

[28] 43 Fed. Reg. 14892 (1978). OFCCP confirmed its earlier findings in a more recent study of construction goals for women. OFCCP, Women in Construction (May, 1981). The authors of the 1981 study concluded that more women are available and interested in working in the construction trades than are participating, and that OFCCP goals created a demand for women construction workers and facilitated the employment of many of the women interested in work in the trades. See also Westley, A Territorial Issue: A Study of Women in the Construction Trades (1982).

The advances of women in the coal mining and shipbuilding industries are further examples of the need to use gender-conscious measures to open up nontraditional jobs for women. There were no women coal miners in 1973. In the early 1970's, OFCCP targeted the coal mining industry as one of several industries on which to focus its enforcement activities, with the result that coal mine operators began to comply with their affirmative action obligations under Executive Order 11246, as amended. The gains achieved by women because of this focus were dramatic. By December 31, 1980, 3,295 women had become coal miners. As a result of affirmative action, the percentage of women hired in the industry went from 0 to 8.7% in seven years.[29] Simi-

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[29] Examinination on Issues Affecting Women in Our Nation's Labor Force: Hearings Before the Senate Committee on Labor and Human Resources, 97th Cong., 1st

larly, the numbers of women workers dramatically increased when the Maritime Administration required shipbuilding contractors to establish goals and timetables for women. The contractors found that as more women were hired, more applied.[30]

The foregoing illustrates that it is only when specific, objective, gender-conscious measures are used that women gain access to nontraditional jobs. Indeed, women's interest in and availability for such jobs has been demonstrated whenever the setting of goals and timetables required employers to recruit and hire them.[31] Moreover, it is clear that the

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Sess. (1981) (testimony of Betty Jean Hall, Director, Coal Employment Project).

[30] Women's Work, supra at 77.

[31] Women's Bureau, U.S. Department of Labor, "A Woman's Guide to Apprenticeship" (1980).

scarcity of women in nontraditional jobs cannot be attributed to lack of desire by women for those jobs. When occupations become open, women have responded by moving into them.[32] Gender-conscious measures such as those employed by Respondent are necessary to ensure that more occupations become available to women. In adopting affirmative action goals for women, the Santa Clara County Transportation Agency was merely fulfilling its Title VII obligation to see that women achieve equal employment opportunity.[33]

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32 Women's Work, supra at p. 77. The editors found that women's occupational choices and preferences play only a limited role in explaining occupational segregation by sex. Id. at p. 80

33 See supra Section I. B., pp. 17-33.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that the decision of the United States Court of Appeals for the Ninth Circuit be affirmed.

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APPENDIX

INTEREST AND DESCRIPTION OF AMICI CURIAE

The NOW Legal Defense and Education Fund ("NOW LDEF") is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women. A major goal of the NOW LDEF is eliminating barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination, including cases before this Court involving challenges to the use of affirmative action remedies to achieve equal employment opportunity.

The National Organization for Women ("NOW") is the largest feminist organization in the United States, with a membership of over 150,000 women and men in more than 750 chapters throughout the country. Since its founding in 1966, a major goal of NOW has been the eradication of sex discrimination in employment, and the elimination of barriers that deny women economic opportunities and the ability to become economically self-sufficient. NOW believes that economic equality in the paid work force is fundamental to women's ability to achieve equality in other aspects of society. In furthering its commitment to that goal, NOW has participated in numerous cases and commented on proposed legislation and regulations to secure full enforcement of laws prohibiting employment discrimination, and is committed

to the use of affirmative action to achieve equal employment opportunity.

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. To help eliminate the pervasive problem of gender-based discrimination, the ACLU has established the Women's Right Project, which has appeared before this Court in many sex discrimination cases.

California Women Lawyers ("CWL") is a statewide association representing the interests of the approximately fifteen thousand women lawyers in the State of California. It has both individual members, including male and female lawyers, judges, and law students, and twenty-seven local affiliates throughout the state. CWL

is dedicated to education and advocacy regarding legal rights of women and equality of opportunity for women.

Employment Law Center is a project of the Legal Aid Society of San Francisco. The Center is committed to providing legal services to women, minorities and other disadvantaged persons in order to vindicate their right to equal employment opportunity.

Equal Rights Advocates, Inc. ("ERA, Inc.") is a San Francisco-based public interest legal and educational corporation specializing in sex discrimination. It has a long history of interest, activism, and advocacy in all areas of the law which affect equality between the sexes. ERA, Inc. has been particularly concerned with gender equality in the work force because economic independence is fundamental to women's ability to gain equality in other

aspects of society. ERA, Inc. believes that affirmative action is a necessary and appropriate step if women and minorities are to achieve equal opportunity in the workplace.

Federally Employed Women's Legal and Education Fund, Inc. is a non-profit organization, incorporated in 1977 under the laws of the District of Columbia. It was established to undertake legal, educational, and research activities in order to eliminate unlawful discrimination in the federal government on the basis of race, sex, religion, national origin, age, handicap, and lawful political affiliation. The Board of Directors of the Fund consists of federal attorneys and other federal employees, and attorneys not federally employed who have extensive experience in the area of federal employment opportunity. The Fund provides counseling, case screen-

ing, and other legal and educational services to federal employees. The Fund has a particular interest in the instant litigation to establish that affirmative action plans that call for increased representation of women in the federal workforce are not in violation of Title VII.

The League of Women Voters of the United States ("LWVUS" or "League") is a national, non-partisan, non-profit membership organization with a current membership of 110,000 in more than 1250 state and local Leagues in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. Since being founded in 1920, the LWVUS's purpose has been to promote political responsibility through informed and active participation of citizens in government. The LWVUS believes that no person or group should suffer

legal, economic or administrative discrimination, and that government and private institutions share responsibility to provide equal opportunity in employment. As part of its commitment to the eradication of employment discrimination against minorities and women, the LWVUS has participated as an amicus in support of the use of affirmative action remedies in a number of major cases.

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation established under the laws of New York State. It was formed to assist black persons to secure their civil rights by means of litigation. For many years attorneys at the Legal Defense Fund have represented parties in litigation before this Court and the lower courts involving a variety of issues regarding racial discrim-

ination and race-conscious affirmative action plans.

The National Women's Law Center is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and to the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in the workplace through full enforcement of Title VII of the Civil Rights Act of 1964, as amended, and other civil rights statutes, and through the implementation of effective remedies for longstanding employment discrimination against women and minorities.

The Northwest Women's Law Center is a non-profit public interest law organization concerned with securing equal rights for women through the law. It has participated in federal and state litigation and public

education efforts directed toward ending unlawful discrimination on the basis of sex. The Law Center has analyzed and commented on local affirmative action plans designed to eliminate past effects of discrimination toward women and minorities. It believes affirmative action is an effective tool toward realizing equality.

Women Employed is a national organization, based in Chicago, with a membership of 3,000 women workers. Over the past ten years the organization has assisted working women with problems of sex discrimination. Women Employed also monitors the enforcement, actions and policies of the EEOC and Office of Federal Contract Compliance Programs with regard to a broad range of sex discrimination issues.

Women's Equity Action League ("WEAL") is a national non-profit membership organization dedicated to securing the

legal and economic rights of women. The effective enforcement of civil rights laws has been a major priority of WEAL since its founding in 1968, particularly with respect to the remedy of employment discrimination through affirmative action.

Women's Law Project is a non-profit law firm dedicated to advancing the status of women through litigation and public education. Founded in 1973, the Women's Law Project has conducted major litigation on behalf of women in the areas of reproductive freedom, family law, discrimination in employment, credit and insurance, and the rights of female prisoners.

The Women's Law Project is especially concerned with the problems of employed women, and has challenged through litigation and public education layoff policies which disproportionately affect women or minorities. Women's Law Project believes

in the validity of and necessity for sex- and race-based preferences to remedy handicaps of past discrimination and to preserve those gains made by women and minorities in recent years.

The Women's Legal Defense Fund ("WLDF") is a non-profit, tax-exempt membership organization, founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, public education, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of equal opportunity laws. A major priority for WLDF is its Project for Women

of Color. In its pursuit of equality for both women and minorities, WLDF is committed to the use of affirmative action to achieve equal employment opportunity.